KHO AH SOON

v.

DUNIAGA SDN. BHD.

SUPREME COURT, ALOR SETAR
DATUK CHONG SIEW FAI CJ (SABAH & SARAWAK)
DATO' PEH SWEE CHIN FCJ
DATO' WAN ADNAN BIN ISMAIL FCJ
[CIVIL APPEAL NO. 02-475-91]
10 FEBRUARY 1996

LAND LAW: *Private caveat - Removal by order of Court - National Land Code s. 327 - Propriety of order - Order based on allegations which had been credibly denied - Absence of oral evidence - Whether order proper - Whether flawed - Whether Court to decide only on consideration of undisputed facts in affidavits - Consideration of American Cyanamid v. Ethicon Ltd. & Eng Mee Yong v. Letchumanan - Whether evidence adduced raised serious question to be tried.*

On 12 September 1989, the respondent, Duniaga Sdn. Bhd. (the caveatee), gave an option to one Tan, the second defendant in Penang High Court Civil Suit No. 22-28-1990, for the latter to sell the respondent's two pieces of land for a consideration of RM410,000. This option was to expire on 26 September 1989. Tan later issued a sub-option in favour of the appellant (the caveator), giving the latter an option, also until 26 September 1989, to sell or buy the land for RM580,000. On 26 September 1989, the appellant caveator, through his solicitors, sent a letter to the respondent, and by that sought to exercise the option to buy the land at RM580,000. Having done that the appellant lodged a private caveat against the said land.

By notice of motion dated 9 July 1990, the respondent applied to remove the caveat. The appellant contested the motion, and *inter alia* put forth the argument that the caveat ought to stand as he had exercised both the options. The learned Judge, nonetheless, rejected the contention, and on 28 October 1991, made an order removing the caveat. The Judge was of the view that the appellant had no cause of action as there was no privity of contract between him and the respondent caveatee. According to the Judge further, the main option was unenforceable for want of consideration and that, although it was good as an offer and could give rise to a valid contract if accepted before its revocation, the letter of acceptance as posted on 26 September 1989 was never received by the respondent. These apart, the learned Judge also opined that the grant of the sub-option by Tan to the appellant was done in breach of the former's duty, and so, no contract could have arisen from the purported exercise of the sub-option. Upon these findings the Judge ruled that there was no serious question for trial and hence his order aforesaid.

The appellant appealed and before the Supreme Court the primary issues that arose were:

1. Whether the learned Judge had erred in his handling of the facts, such that, his finding that there was no serious question for trial was contrary to evidence.

2. Whether, bearing in mind the principles laid down in *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 369, and *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212, the learned Judge had also erred in his handling of the law, in that, in deciding the fate of the motion the way he did, he had dwelt upon credibly-denied allegations, or had otherwise failed to confine himself to consideration of undisputed facts in affidavits.

Held:

Per Peh Swee Chin FCJ (delivering the judgment of the Court):

[1] It is settled that in a matter of a caveat as between a caveator and caveatee, as in the instant appeal, the onus is on the caveator to satisfy the Court that his evidence does raise a serious question to be tried as regards his claim to an interest in the land in question. This serious question could mean a question not being vexatious. Having done that, he must further show, on the balance of convenience, that it would be better to maintain the *status quo* until the trial of the action by preventing the caveatee from disposing of his land.

[2] This Court cannot agree with the finding of the trial Judge that the caveator had no cause of action for absence of privity of contract. Since the option was an offer, such cause of action would be dependent on the highly controversial issue as to whether the offer was validly accepted. This would be a serious question for trial.

[3] In an application of this nature, the Court should decide only on consideration of undisputed facts in affidavits and not on credibly-denied allegations, in the absence of oral evidence and cross-examination. Disputed issues therefore should not and could not be used by the lower Court to decide the fate of the motion. In the circumstances it was wrong of the trial Judge to have decided that the letter of acceptance that was being allegedly posted by the caveator to the caveatee was never received, or that, in relation to the issue of the sub-option, that the notice of exercising the sub-option on a woman who claimed to be the wife of the said Tan was not effective.

[4] The decision of the Court below was also flawed when it found that "by issuing the sub-option to the caveator to buy or sell the lands at RM580,000, the agent (Tan) was in clear breach of the duty, and therefore there was no contract resulting from the purported exercise of the sub-

option by which the caveatee was bound", or that "Tan had no authority to issue the sub-option to the caveator at a price higher than the price of RM410,000". These are questions which ought to be fully argued at the trial of the said civil suit by the parties, they being serious questions for trial.

[5] Serious questions there indeed were, the said Penang High Court Civil Suit No. 22-28-1990 ought to be allowed to be heard without being rendered futile by the removal of the private caveat.

[Appeal allowed. Order of Court below set aside]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG TANAH:** Kaveat persendirian - Pembatalan oleh perintah Mahkamah - Kanun Tanah Negara s. 327 - Kewajaran perintah - Perintah berdasarkan dakwaan-dakwaan yang telah dinafikan secara munasabah - Ketiadaan keterangan lisan - Samada perintah menurut aturan - Samada tidak sempurna - Samada Mahkamah harus membuat keputusan hanya atas pertimbangan fakta-fakta yang tidak dipertikaikan dalam afidavit - Pertimbangan terhadap American Cyanamid lwn. Ethicon Ltd. & Eng Mee Yong lwn. Letchumanan - Samada keterangan yang dikemukakan membangkitkan persoalan yang serius untuk dibicarakan.*

Pada 12 September 1989, responden, Duniaga Sdn. Bhd. (penanggung kaveat), telah memberikan satu opsyen kepada seorang bernama Tan, defendan kedua dalam Guaman Sivil Mahkamah Tinggi Pulau Pinang No. 22-28-1990, bagi pihak yang terkemudian itu menjual kedua-dua bidang tanah responden bagi balasan sebanyak RM410,000. Opsyen ini sepatutnya luput tempohnya pada 26 September 1989. Tan kemudiannya telah mengeluarkan satu sub-opsyen atas nama perayu (pengkaveat), memberi pihak terkemudian itu satu opsyen, yang juga sah sehingga 26 September 1989, untuk menjual atau membeli tanah-tanah tersebut bagi jumlah sebanyak RM580,000. Pada 26 September 1989, pengkaveat perayu, melalui peguamcaranya, telah mengirim surat kepada responden, dan melaluinya melaksanakan opsyen tersebut untuk membeli tanah pada harga RM580,000. Setelah berbuat demikian, satu kaveat persendirian telah dimasukkan oleh perayu terhadap tanah tersebut.

Melalui notis usul bertarikh 9 Julai 1990, responden telah memohon untuk membatalkan kaveat di atas. Perayu mempertikaikan usul itu, dan antara lain telah mengemukakan hujah bahawa kaveat tersebut harus dikekalkan kerana beliau telah melaksanakan kedua-dua opsyen berkenaan. Hakim yang bijaksana, namun demikian, telah menolak penegasan perayu, dan pada 28 Oktober 1991, membuat perintah membatalkan kaveat tersebut. Hakim berpendapat bahawa perayu tidak mempunyai kausa tindakan kerana tidak terdapat priviti kontrak antara beliau dan penanggung kaveat responden. Selanjutnya, menurut Hakim, opsyen utama tidak boleh dilaksanakan kerana ketiadaan balasan, walaupun

ianya baik sebagai satu tawaran dan boleh membangkitkan satu kontrak yang sah jika diterima sebelum pembatalannya, surat penerimaan tersebut sepertimana yang diposkan pada 26 September 1989 itu tidak diterima oleh responden. Selain itu, Hakim yang bijaksana berpendapat bahawa pemberian sub-opsyen oleh Tan kepada perayu telah dilakukan dalam kemungkiran tugas pihak yang terdahulu, dan oleh yang demikian, tiada kontrak boleh berbangkit hasil dari perlaksanaan sub-opsyen tersebut. Berdasarkan penemuan-penemuan ini, Hakim memutuskan bahawa tidak terdapat persoalan serius untuk perbicaraan dan yang demikian mengakibatkan perintah seperti di atas.

Perayu telah merayu dan di hadapan Mahkamah Agung isu-isu utama yang berbangkit adalah:

1. Samada Hakim yang bijaksana telah tersalah dalam mengendalikan fakta-fakta dengan sedemikian rupanya sehinggakan keputusannya bahawa tidak terdapat persoalan serius untuk perbicaraan adalah bertentangan dengan keterangan.

2. Samada dengan memikirkan prinsip-prinsip yang dibentangkan dalam *American Cyanamid Co. lwn. Ethicon Ltd.* [1975] AC 369, dan *Eng Mee Yong lwn. Letchumanan* [1979] 2 MLJ 212, Hakim yang bijaksana telah juga tersalah dalam menangani persoalan undang-undang, iaitu, dalam menentukan nasib usul menurut cara yang dibuatnya di sini, beliau telah membicarakan pengataan-pengataan yang telah dinafikan dengan munasabahnya, atau sebaliknya, telah gagal membatasi dirinya hanya kepada mempertimbangkan fakta-fakta yang tidak dipertikaikan dalam afidavit.

Diputuskan:

Oleh Peh Swee Chin HMP (menyampaikan keputusan Mahkamah):

[1] Sudah menjadi ketetapan bahawa dalam perkara sesuatu kaveat, sebagaimana antara pengkaveat dan penanggung kaveat, sepertimana yang berlaku dalam rayuan semasa, beban adalah di atas pengkaveat untuk menyakinkan Mahkamah bahawa keterangannya membangkitkan satu persoalan yang serius untuk dibicarakan berhubung dengan tuntutannya kepada kepentingan dalam tanah yang dipersoalkan. Persoalan serius ini, boleh bermaksud persoalan yang bukan menyusahkan. Setelah melakukan demikian, beliau mestilah menunjukkan seterusnya, atas imbangan keselesaan, bahawa ianya lebih baik untuk mengekalkan *status quo* sehingga perbicaraan tindakan tersebut dengan menghalang penanggung kaveat daripada melupuskan tanahnya.

[2] Mahkamah ini tidak boleh menyetujui pendapat Hakim perbicaraan bahawa pengkaveat tidak mempunyai kausa tindakan kerana ketiadaan priviti kontrak. Oleh kerana opsyen tersebut merupakan suatu tawaran, kausa yang sedemikian akan bergantung pada isu yang sungguh kontraversi, ia

itu mengenai samada tawaran tersebut diterima secara sah. Ini merupakan suatu persoalan yang serius untuk perbicaraan.

[3] Dalam permohonan yang seperti ini, dengan ketiadaan keterangan lisan dan pemeriksaan balas, Mahkamah haruslah memutuskan hanya atas pertimbangan fakta-fakta dalam afidavit yang tidak dipertikaikan dan bukannya di atas pengataan-pengataan yang dinafikan secara munasabah. Isu-isu yang dipertikaikan, dengan itu, tidak seharusnya dan tidak boleh digunakan oleh Mahkamah Rendah bagi memutuskan nasib usul tersebut. Dalam keadaan yang sedemikian, adalah salah bagi Hakim perbicaraan untuk memutuskan bahawa surat penerimaan yang dikatakan telah diposkan oleh pengkaveat kepada penanggung kaveat telah tidak pernah diterima, atau berhubung dengan isu sub-opsyen pula, bahawa notis melaksanakan sub-opsyen tersebut keatas seorang wanita yang menuntut menjadi isteri kepada Tan adalah tidak berkuatkuasa.

[4] Keputusan Mahkamah di bawah telah juga tersalah apabila ia berpendapat bahawa "dengan mengeluarkan sub-opsyen kepada pengkaveat untuk membeli atau menjual tanah-tanah itu pada harga RM580,000, ejen tersebut (Tan) telah jelas memungkiri kewajipannya, dan dengan itu tidak terdapat apa-apa kontrak akibat dari perlaksanaan opsyen itu seperti yang dikatakan yang mengikat penanggung kaveat" atau bahawa "Tan tidak mempunyai kuasa untuk mengeluarkan sub-opsyen kepada pengkaveat pada harga yang lebih tinggi daripada RM410,000". Semua ini merupakan persoalan-persoalan yang harus dihujahkan sepenuhnya di perbicaraan guaman sivil oleh pihak-pihak terlibat, oleh kerana ianya adalah persoalan-persoalan yang serius untuk dibicarakan.

[5] Oleh kerana memang terdapat persoalan-persoalan yang serius, Guaman Sivil Mahkamah Pulau Pinang No. 22-28-1990 haruslah dibenarkan untuk didengar tanpa menjadikannya sia-sia sahaja dengan pembatalan kaveat persendirian tersebut.

[Rayuan dibenarkan. Perintah Mahkamah di bawah diketepikan]

Cases referred to:
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
American Cyanamid v. Ethicon [1975] AC 396 ***(refd)***
Goldsbrough Mart & Co. Ltd. v. John Thomas Zumn [1910] 10 CLR 674 ***(refd)***
Tan Choon Bok v. Tahanson Sdn. Bhd. [1987] CLJ 441, [1987] 1 MLJ 433 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 2(d)

For the appellant - Maikal Yasu (Murali with him); M/s. Anwar & Maikal, Penang
For the respondent - VM Mohan (Cheong Ying We with him); M/s. JB Lim Suhaimi & Khaw, Butterworth

JUDGMENT

Peh Swee Chin FCJ:

This is an appeal by the defendant, Kho Ah Soon, against an order dated 28 October 1991 of the Penang High Court ordering the removal of a private caveat No. 5853/89, Jilid 207, Folio 56 dated 3 November 1989 lodged by the defendant against certain lands described therein, the said order having been made in pursuance of a Notice of Motion No. 25-46-1990 dated 9 July 1990.

The order appealed from has never been extracted and in the said notice of motion, the plaintiff had asked for, in addition to the removal of the said private caveat, another order for the setting aside of yet some other order made in some other originating summons ie. the Originating Summons No. 24-55-1990.

The prayer for setting aside that other order was not mentioned at all in the relevant notes of proceeding, (page 63 to page 65 of the appeal record), and from the said notes, the Court below merely made an order to the effect that the said private caveat be removed, (page 64 *ibid*); that the caveator do pay compensation to be assessed by the Senior Assistant Registrar, (page 65 *ibid*), and that leave to appeal be granted (page 65 *ibid*). We will therefore confine ourselves to dealing solely with the order of removal of the private caveat aforesaid, (plaintiff in this notice of motion is hereinafter called the caveatee and the defendant, the caveator).

It is common ground that the said private caveat is connected with a pending civil suit, being High Court Civil Suit No. 22-28-1990 in which briefly, the caveator is the plaintiff and the caveatee, the 1st defendant; and in which the caveator has sued for specific performance of an alleged agreement with the caveatee for the latter to sell, and the caveator to buy the lands, against which, the private caveat herein was lodged in the first place. The 2nd defendant in that civil suit is alleged to be an "option holder" for the sale of the said lands in respect of such an option from the caveatee while the 3rd defendant is alleged to be a party in conspiracy with the other co-defendants to "defraud and injure" the plaintiff.

It is settled that in a matter of removal of a caveat as between a caveator and caveatee, as in the instant appeal, the onus is on the caveator to satisfy the Court that his evidence does raise a serious question to be tried as regards his claim to an interest in the land in question, and having done his claim so he must show that, on a balance of convenience, it would be better to maintain the *status quo* until the trial of the action by preventing the caveatee from disposing of his land, as laid down by Lord Diplock in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212, and by analogy indirectly to *American Cyanamid* case [1975] AC 396 as indicated by Lord Diplock indirectly, the serious question for trial referred to above could mean a question not being vexatious or frivolous.

The Court below did bear in mind correctly the case of *Eng Mee Yong* but had ordered the removal of the said private caveat because, to quote; "when ordering the removal of caveat, I had thought that the option being unsupported by consideration was unenforceable, (see s. 2(d) of Contracts Act, 1950)". In the grounds of judgment of the Court below, the said Court stated that the said Court recognized that the option could still be good as an offer and that such an offer, if accepted before its revocation, could give rise to a contract, citing *Goldsbrough Mart & Co. Ltd. v. John Thomas Zumn*, [1910] 10 CLR 674, 691.

The caveatee had given the option to the 2nd defendant, one Tan in the abovementioned civil suit, (hereinafter called Tan), ie. an option to sell the said lands for RM410,000 and allegedly the caveator had exercised his option to buy the said lands at RM580,000 by a letter allegedly sent in the nick of time and dated 26 September 1989 through his solicitor to the caveatee who was alleged to have duly acknowledged receipt of it. The caveator alleged that, alternatively, the said Tan had assigned the said option he held of the caveatee to him by means of a sub-option to the caveator who allegedly has exercised the sub-option too.

The said option and the said sub-option are set out below for ease of reference:

OPTION

Kompleks Chain Ferry
4656, 4657, Tingkat Bawah
Jalan Chain Ferry
12100 Butterworth, P.W
Tel. No: 342506/343672

Duniaga Sdn. Bhd.
Perniagaan Dalam Bidang Pembangunan Perumahan

Bil Tuan:
Bil Kami:

12 September 1989

Mr Tan Hoon Seng
I/C No 0304552
No, Lorong Garen
13700 Prai

Dear Sir

OPTION TO SELL

Option is hereby given to Mr Tan Hoon Seng, No. 0304552 of No 1, Lorong Haruan, Supreme Garden, 13700 Prai, to sell the following property known as Lot No. PT 2364 & PT 2365, Mukim 11, Seberang Perai, having a total land area

of 42,147 sq ft for a consideration sum of $410,000 dollars: Four Hundred and Ten Thousand Only, payable as follows:

1. 10% deposit upon execution of the Sale and Purchase Agreement

2. The balance of the purchase price to period within 3 months upon the execution of the Sale and Purchase Agreement.

This option is valid for a period of 14 days from the date hereof. The commission to be paid by us is $18,000. Dollars: Eighteen Thousand and payable on execution of the sale and purchase agreement of the above property.

Thank you.

Yours faithfully
Duniaga Sdn. Bhd.

Signed

(Ishak bin Kamaruno)
General Manager

SUB-OPTION

I, TAN BOON SENG (NRIC No. 0304552) Of No 1, Lorong Haruan Satu, Supreme Garden, 13700 Prai, do confirm that I have been given an option to sell the undermentioned pieces or parcels of land by the registered owners of the said land namely Duniaga Sdn. Bhd.

The option granted to me expires on 26.9.1989.

I do now grant a sub-option to sell or to buy the said land to MR KHO AH SOON (NRIC No 3649026) of 491, Sungai Rambai, Bukit Mertajam, P.W. at a price of $580,000 (for both pieces of land).

This option shall expire on 26.9.89.

I also confirm receipt of a sum of $10/- as consideration for this option.

This Lands Referred to:

1. H.S.(D) 2363/PT 2364 measuring 27719 sq feet.

2. H.S.(D) 2364/PT 2365 measuring 14428 sq feet.

both situated in Mk. 11, Seberang Perai, Tengah, Penang

Signed
(Tan Hoon Seng)

It was the contention of the caveator that he had exercised both the options.

To revert to the grounds of judgment of the Court below, it stated that there was no serious question for trial (in any event), and the said private caveat was, (in any event), correctly removed for the following reasons.

a First the Court below said that the caveator had no cause of action as between the caveator and the caveatee, because there was no privity of contract. We are unable to agree, since the option was an offer, such cause of action would be dependant on the highly controversial issue as to whether the offer was validly accepted. This would be a serious question for trial, dependent on b evidence and cross-examination.

The Court below said that the letter of acceptance being allegedly posted by the caveator to the caveatee was never received. Further on the issue of the sub-option, the notice of exercising the said sub-option on a woman who claimed to be the wife of the said Tan was not effective. These disputed c issues with what has been stated in the preceding paragraph, should not and could not be used by the lower Court to decide the fate of the motion, please see *Tan Choon Bok v. Tahanson Sdn. Bhd.* [1987] 1 MLJ 433, PC ie. a Court should decide only on consideration of undisputed facts in affidavits and not on credibly-denied allegations, in the absence of oral evidence and cross- d examination, per Lord Templeman at page 436, *ibid.*

The Court below further sought to justify the conclusion that there was no serious question for trial by stating:

> In the present case, by issuing the sub-option to caveator to buy or to sell the e lands at a price of RM580,000 which was RM170,000 in excess of his mandate to sell as appeared in the option, the Agent was in clear breach of his duty, as the caveator knew or must have known since he had been shown the option, right from the start, and so there was no contract resulting from the purported exercise of the sub-option by which the caveatee was bound.

f It stated before the quoted passage, that Tan, (ie. the "agent" referred to), had no authority to issue the sub-option to the caveator, at a price other than the price of RM410,000 (the price mentioned in the sub-option being RM450,000).

g We are unable to agree without reservations to the above view. These questions ought to be fully argued at the trial of the said civil suit by the parties in the Court below, being serious questions for trial.

We are satisfied that there are indeed serious questions for trial, such questions not being frivolous or vexatious, and that the above-mentioned civil suit ought h to be allowed to be heard without its being rendered futile by the removal of the private caveat in question. The private caveat ought to remain until the disposal of the said civil suit for maintaing the *status quo.*

We therefore allow the appeal with costs here and below, and the order of the lower Court dated 28 October 1991 is hereby set aside. i

Reported by W.A. Sharif